TIMHAR JIMDANI ONG & ANOR A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
RAUS SHARIF JCA
ABDULL HAMID EMBONG JCA
SULONG MATJERAIE JCA
[CRIMINAL APPEAL NOS: S-05-82-2009 & S-05-86-2009]
29 OCTOBER 2009 C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in a dangerous drug - 336.66g Methamphetamine - 'Mens rea possession' - Whether defendants had actual knowledge of drugs - Conduct of defendants upon arrest - Caution statements of both defendants, consistency - Defence that box containing drugs belonged to third party - Whether previously discussed and an afterthought - Particulars of prosecution's evidence against defendants not mentioned in arresting officer's police report or in prosecution's opening statement - Whether narration of police witnesses at trial a fabrication* D E

CRIMINAL PROCEDURE: *Prosecution - Opening statement - Criminal Procedure Code, s. 179 - Opening statement in criminal trials before single judge sitting alone - Whether as important as in jury trials - Whether merely to satisfy court that charge against accused not frivolous - Whether full details of prosecution's evidence must be particularised in opening statement - Whether prosecution must tender copy of opening statement to be marked by court - Whether opening statement must be in writing or can be oral - Whether prosecution can adduce at trial evidence not mentioned in opening statement - Whether trial court had been misled - Whether accused tactically disadvantaged or prejudiced resulting in unfairness or failure of justice* F G

CRIMINAL PROCEDURE: *Police investigation - First information report - Police report - Whether report must particularise every action taken or observation made by arresting officer - Whether report must contain entire case for prosecution - Whether omissions in report fatal to prosecution's case - Whether report can be held to be materially inconsistent with prosecution's narration of facts at trial - Whether omissions in report diminish weight of arresting officer's testimony or credibility - Whether omissions in police report should have been put to arresting officer during cross-examination or can be raised at submissions stage* H I

A The appellants were charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 for trafficking in a dangerous drug, to wit, 336.66g of Methamphetamine. At the end of the trial the appellants were found guilty, convicted and sentenced to death under s. 39B(2) thereof. In accepting the prosecution's case that the appellants did B have actual knowledge of the drugs that were found concealed in a box in their hotel room, the trial judge had accepted the prosecution's evidence respecting the conduct of the appellants, namely: (i) the action of the 1st appellant in attempting to prevent the police party from entering the said hotel room; (ii) the C utterances of the 2nd appellant upon the discovery of the drugs by the police ("they have found the thing"); and (iii) the attempt by both the appellants to bribe the police into not arresting them.

Before the Court of Appeal herein the appellants contended that: D (a) the prosecution had not, in its opening statement, adverted to either the incriminating words allegedly uttered by the 2nd appellant or the alleged attempt by the appellants to bribe the police. Nor were these alleged facts recorded in the police report lodged by the arresting officer. It was, therefore, submitted that the subsequent E narration/evidence of the police-witnesses in respect thereof was a recent invention and fabrication; and (b) the trial judge had misdirected himself in failing to consider the respective caution-statements of the appellants in which they both consistently adverted to the fact that the box containing the drugs belonged to F a stranger known as Safia.

Held (dismissing the appeal)
Per Abdull Hamid Embong JCA delivering the judgment of the court:

G **[1]** The police report lodged by the arresting officer was merely a brief account of what had transpired in the hotel room. It was a formal procedure undertaken by the police following the arrest. It was a first information report to facilitate further investigations. Such a police report need not particularise the H details of every action taken, or observation made, by the arresting officer. A first information report, or any police report, need not contain the entire case for the prosecution. Consequently, any omission or shortcoming in the said police report could not be fatal to the prosecution's case or be held

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to be materially inconsistent with the prosecution's narration of facts during the trial. The omissions did not diminish the weight of the arresting officer's testimony or his credibility. (paras 14, 15 & 16)

[1a] The omissions in his police report should rightly have been put to the arresting officer during his cross-examination instead of being raised at the submissions stage. This is not only a technical rule of evidence but one of essential justice. (paras 17, 18 & 19)

[2] The prosecution's opening statement is an important procedural step where it introduces its case and narrates the story to the jury. However, in a criminal trial which is presided over by a single judge as trier of both fact and law, the opening statement does not have the same importance. The trial judge does not need this 'curtain raiser' for the prosecution to lay out a detailed roadmap of its case. Section 179 of the Criminal Procedure Code only requires the prosecution to satisfy the court that the charge against the accused is not frivolous and that there is some material for proceeding against him. The details of the evidence are not expected to be produced *via* the opening statement. In most cases, the charge itself is a sufficient overview of the evidence that needs to be adduced. There is no necessity for the prosecution to tender a copy of its opening statement to be marked by the court, nor is there even a need for the statement to be in writing. Consequently, the prosecution's omission from its opening statement, *vis-à-vis* the incriminating words allegedly uttered by the 2nd appellant and the alleged attempt by the appellants to bribe the police, was immaterial and not fatal to its case. It did not automatically follow that the subsequent narration of the police-witnesses was an afterthought or a recent invention. The prosecution was not precluded from adducing at the trial evidence not previously mentioned in its opening statement. The trial court had not been misled nor were the appellants tactically disadvantaged or prejudiced resulting in unfairness to them or in a failure of justice. (paras 19, 22, 23 24, 25, 26, 27, 28 & 29)

[2a] The trial judge's acceptance of the prosecution's version with respect to the incriminating words uttered by the 2nd appellant and the attempt by both the appellants to bribe the police was based entirely on the evidence as he had found them. There was no reason for appellate interference with those findings of fact. (paras 30, 31, 32 & 33)

[3] The trial judge was correct in rejecting the appellants' version that the box containing the drugs belonged to a stranger known as Safia. Through their own admission, the appellants had had the opportunity to discuss the case and possibly conjure up the story about Safia in their respective caution-statements. The trial judge had properly appraised the demeanour and performance of all the witnesses. There was no reason to disturb his findings of fact which were based on the credibility of the witnesses. (paras 37, 38, 39, 40, 41, 42, 43, 44, 45 46 & 47)

[Conviction and sentence affirmed.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu telah dituduh di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 kerana mengedar dadah berbahaya, iaitu, 336.66g Methamphetamine. Di akhir perbicaraan, perayu-perayu didapati bersalah, disabit dan dihukum mati di bawah s. 39B(2). Dalam menerima kes pendakwaan bahawa perayu-perayu mempunyai pengetahuan benar mengenai dadah yang dijumpai tersembunyi di dalam sebuah kotak di dalam bilik hotel mereka, hakim bicara telah menerima keterangan pendakwaan mengenai kelakuan perayu-perayu, iaitu: (i) aksi perayu pertama dalam cuba menghalang pihak polis dari memasuki bilik hotel tersebut; (ii) kata-kata yang dikeluarkan oleh perayu kedua apabila membuat penemuan dadah-dadah oleh pihak polis ('mereka telah jumpa barang itu'); dan (iii) percubaan oleh perayu-perayu untuk memberi rasuah kepada polis supaya polis tidak menangkap mereka.

Di hadapan Mahkamah Rayuan perayu-perayu berhujah bahawa: (a) pendakwaan tidak, di dalam kenyataan pembukaannya, mengutarakan perkataan-perkataan yang boleh menunjukkan kebersalahan yang didakwa telah dinyatakan oleh perayu kedua atau percubaan yang

didakwa telah dibuat oleh perayu-perayu untuk memberi rasuah kepada pihak polis. Fakta-fakta yang didakwa ini tidak direkodkan di dalam laporan polis yang dikemukakan oleh pegawai penangkapan. Oleh itu, ia dihujahkan bahawa pembentangan/keterangan oleh polis-saksi adalah rekaan dan pemalsuan; dan (b) hakim bicara telah tersalah arah apabila gagal untuk mempertimbangkan pernyataan beramaran perayu-perayu di mana kedua-duanya dengan cara konsisten membangkitkan fakta bahawa kotak yang mengandungi dadah-dadah dimiliki oleh seorang yang tidak dikenali mereka iaitu Safia.

Diputuskan (menolak rayuan)
Oleh Abdull Hamid Embong HMR menyampaikan penghakiman mahkamah:

(1) Laporan polis yang dibuat oleh pegawai penangkapan hanyalah huraian pendek mengenai apa yang terjadi di dalam bilik hotel. Ia adalah prosedur rasmi yang diambil oleh pihak polis berikutan penangkapan perayu-perayu. Ia adalah laporan maklumat pertama untuk memudahkan penyiasatan. Laporan polis seperti itu tidak memerlukan setiap butir mengenai aksi yang diambil atau setiap pemerhatian yang dibuat diperincikan, oleh pegawai penangkapan. Laporan maklumat pertama, atau apa jenis laporan polis, tidak perlu mengandungi keseluruhan kes untuk pendakwaan. Akibat itu, apa-apa peninggalan atau kekurangan di dalam laporan polis tidaklah fatal kepada kes pendakwaan atau diputuskan sebagai tidak konsisten secara material dengan pembentangan fakta pihak pendakwaan semasa perbicaraan. Peninggalan fakta tidak mengurangkan kepentingan testimoni atau kredibiliti pegawai penangkapan.

(1a) Peninggalan-peninggalan fakta yang terdapat dalam laporan polis memang sepatutnya dipersoalkan semasa periksa-balas pegawai penangkapan dan tidak patut dibangkitkan pada peringkat penghujahan. Ini bukanlah undang-undang teknikal keterangan tetapi adalah perkara keadilan asasi.

(2) Kenyataan pembukaan pihak pendakwaan adalah langkah prosedur yang penting di mana ia memperkenalkan kesnya dan membentangkan hujahan kepada pihak juri. Tetapi, di dalam perbicaraan jenayah yang dipengerusi oleh satu hakim

A sebagai pengadil kedua-dua fakta dan undang-undang, kenyataan pembukaan tidak mempunyai kepentingan yang sama. Hakim bicara tidak perlu 'curtain raiser' untuk pihak pendakwaan membentangkan butir-butir terperinci kes ini. Seksyen 179 Kanun Tatacara Jenayah hanya memerlukan
B pihak pendakwaan memuaskan mahkamah bahawa tuduhan terhadap tertuduh bukanlah remeh dan memang mengandungi material untuk memulakan prosiding terhadapnya. Butir-butir keterangan tidak dijangkakan akan diberi melalui kenyataan pembukaan. Dalam kebanyakan kes, tuduhan adalah gambaran
C keseluruhan yang cukup sebagai keterangan yang perlu dikemukakan. Tidak timbul kewajipan untuk pihak pendakwaan mengemukakan salinan kenyataan pembukaan untuk ditandakan di mahkamah, juga tiada keperluan untuk kenyataan berada dalam keadaan bertulis. Akibat itu,
D peninggalan pendakwaan daripada kenyataan pembukaannya *vis a vis* kata-kata yang boleh menunjukkan kebersalahan yang didakwa dinyatakan oleh perayu kedua dan percubaan perayu-perayu untuk memberi rasuah kepada pihak polis, adalah tidak penting dan tidak fatal kepada kes. Ia tidak secara automatik
E bermakna bahawa huraian selanjutnya polis-saksi adalah perkara yang difikirkan kemudian atau rekaan semata-mata. Pihak pendakwaan tidak boleh disingkir daripada memberi di perbicaraan keterangan yang tidak disebut di dalam kenyataan pembukaan. Mahkamah bicara tidak kekeliruan dan perayu-
F perayu tidak berada dalam keadaan yang melemahkan kedudukan mereka atau memprejudiskan mereka yang membawa kepada ketidakadilan kepada mereka di dalam kegagalan menegakkan keadilan.

G **(2a)** Penerimaan versi pihak pendakwaan oleh hakim bicara mengenai kata-kata yang boleh menunjukkan kebersalahan yang diperkatakan oleh perayu kedua dan percubaan oleh kedua-dua perayu untuk memberi rasuah kepada polis adalah berdasarkan atas keterangan yang sedia ada. Tiada apa-apa
H sebab untuk mahkamah rayuan mengganggu penemuan fakta-fakta tersebut.

(3) Hakim bicara adalah betul apabila menolak versi perayu-perayu bahawa kotak yang mengandungi dadah-dadah tersebut adalah
I kepunyaan orang yang tidak dikenali yang bernama Safia.

Melalui pengakuan mereka sendiri, perayu-perayu mempunyai peluang untuk membincang kes tersebut dan membuat cerita rekaan mengenai Safia di dalam pernyataan beramaran masing-masing. Hakim bicara telah dengan cermat dan teratur menilai demeanour dan perlaksanaan kesemua saksi-saksi. Tidak ada sebab untuk mengganggu penemuan fakta-faktanya yang berdasarkan kredibiliti saksi-saksi.

[Sabitan dan hukuman disahkan.]

Case(s) referred to:
AEG Carapiet v. AY Derderiam AIR 1961 Cal 359 ***(refd)***
Chinnakarappan v. PP [1962] 28 MLJ 360 ***(foll)***
Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC ***(foll)***
Lai Kim Hon v. PP [1981] 1 MLJ 84 ***(refd)***
Muthusamy v. PP [1947] 1 LNS 71 HC ***(refd)***
PP v. Badrulsham Baharom [1987] 1 LNS 72 HC ***(refd)***
PP v. Dato Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(foll)***
PP v. Mohamed Ali [1962] 1 LNS 129 HC ***(foll)***
PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(refd)***
PP v. Tan Chye Joo & Anor [1988] 1 LNS 174 HC ***(refd)***
R v. Solomon [1980] 1 A CRIM R 247 ***(refd)***
RW Harcos v. State Pf West Bengal [1975] Cr LJ 1256 (Cal) ***(foll)***
Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 179
Dangerous Drugs Act 1952, s. 39A(2), 39B
Evidence Act 1950, s. 114(g)

Criminal Procedure Code [India], s. 226

For the appellant - Datuk Chau Chin Tang (Yong Yei Yi with him); M/s Chau & Thien
For the respondent - Awang Armadajaya Awang Mahmud DPP

[Editor's note: For the High Court judgment, please see PP v. Timhar Jimdani Ong & Anor [2009] 8 CLJ 294.]

[Appeal from High Court, Kota Kinabalu; Criminal Appeal No: K-45-04-2006]

Reported by Gan Peng Chiang

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JUDGMENT

Abdull Hamid Embong JCA:

[1] The appellants were originally charged for drugs trafficking under s. 39B of the Dangerous Drugs Act 1952 (the Act) but were convicted under s. 39A(2) of the Act. Pursuant to a successful appeal by the public prosecutor, the Court of Appeal on 27 November 2007 ordered both appellants to enter their defence under the original charge for trafficking. The trial resumed before another judge and both appellants were found guilty and convicted under the original charge, which states:

> That you both, on the 11th day of August 2005 at about 10.50 a.m. in room no. 808, 8th Floor, Kinabalu Daya Hotel, Jalan Pantai, in the District of Kota Kinabalu, in the State of Sabah, did on your own behalf in a dangerous drug to wit 336.66 grams of Methamphetamine and that you both have thereby committed an offence under Section 38B(1)(a) of the Dangerous Drug Act 1952 (Act 234) and punishable under Section 39B(2) of the same Act read with Section 34 of the Penal Code.

Brief Facts

[2] On 11 August 2005 at about 10.50am Inspector Willie anak Nunot (Inspector Willie) led a team of five police officers to conduct a raid at room 808 on the 8th floor of the Kinabalu Daya Hotel, Kota Kinabalu. They had earlier received information that drug trafficking activity was taking place at the hotel.

[3] On arrival at the hotel they enlisted the assistance of a hotel maid to get the occupants of room 808 to open the door. When the door was opened by the 1st appellant (Timhar), Inspector Willie introduced himself as a police officer. On hearing that Timhar tried to push back the door but the police team managed to keep it open. Inspector Willie and his team then entered the room. There were only two occupants inside, namely the 1st and the 2nd appellants who were husband and wife. Both are citizens of the Philippines.

[4] Inspector Willie proceeded to conduct a body search on Timhar but nothing incriminating was found on him. The room was also searched but nothing incriminating was found. Then Lance Corporal Karim bin Evin (Lance Corporal Karim) found a box

bearing the label "Sky Flakes Crackers" on the floor of the room. It was in an open state and a pair of sports shoes and three pairs of lady sandals were inside. Inspector Willie asked Timhar whose shoes were they and he replied they belonged to the 2nd appellant (Nurie). Lance Corporal Karim took out all the shoes and sandals from the box and found nothing else inside. However when he continued to examine the box he saw something suspicious at the underside of the box. He tore the box from inside a little bit and noticed a translucent plastic bag containing white crystalline substances. He then turned over the box and tore the bottom where he found nine plastic packets containing white crystalline substances suspected to be dangerous drugs. According to Inspector Willie if the box had not been torn they would not have been able to see the nine plastic packets. It is obvious that the drugs were cleverly concealed at the underside of the box.

[5] Inspector Willie testified that before the drugs were found the two accused looked panicky but did not say anything. But as soon as the drugs were found Nurie shouted and embraced Timhar and said in Suluk (a Filipino dialect) that the police had found the thing. The actual Suluk words uttered by Nurie were "kia ba kan nila na" which means "the things have been found". This was interpreted to Inspector Willie by Lance Corporal Karim who was fluent in Suluk. Neither Timhar nor Nurie protested when the drugs were discovered. Nurie merely cried and embraced her husband. Lance Corporal Karim testified that when he was examining the box both appellants were constantly looking at it.

[6] After the appellants were handcuffed to each other's hand they tried to bribe the police by offering to pay them any amount if they were freed on that day and not brought to the police station. Inspector Willie did not entertain the request but instead told Timhar that the case would be investigated.

[7] The nine plastic packets were then seized and brought back to the police station. At the police station Inspector Willie made a thorough inspection of the box. He found that the bottom part had been modified by adding another piece of paper board just above the bottom flaps and this piece of paper board was glued all around to the underside of the box. The nine plastic packets were found concealed between the added piece of board and the bottom flaps. Insp. Willie then lodged a police report on the arrest and the recovery of the drugs (exh. P12).

[8] The suspected drugs were sent to the chemistry department for analysis and confirmed to contain 336.66 grammes of methamphetamine, a dangerous drug listed in Part III of the First Schedule of the Dangerous Drugs Act 1952.

The Defence

[9] 1st appellant's version:

> In his defence Timhar chose to give evidence on oath. In essence his defence was that he knew nothing about the drugs as the box belonged to a stranger who asked him to keep it temporarily. His testimony stated that on 6 August 2005 he and Nurie arrived at the Kota Kinabalu airport form Manila. While he was paying the taxi fare at the ticketing counter at the airport a fellow Filipino by the name of Safia approached him and asked whether she could come with them and he agreed. When told by Timhar that they intended to stay at Capital Hotel, Safia suggested that they stay at Kinabalu Daya Hotel as the rate was cheaper. So they proceeded to Kinabalu Daya Hotel but the hotel was fully booked. They then proceeded on foot to Capital Hotel and checked into that hotel. Safia did not check in but asked Timhar to keep a box for her as she had to go to Sandakan. She told Timhar that she would be back to take the box. Timhar agreed. According to him he did not suspect that the box contained any dangerous drugs.
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> Timhar further testified that they only stayed at Capital Hotel for two days and checked out on 8 August 2005 as they could not afford the rental. They then checked in at Kinabalu Daya Hotel at 12pm on the same day. They then went out for lunch. It was at this time that Safia came and asked for the box. The three of them then went up to room 808 where Safia opened the seal of the box and took out a black plastic bag. After taking out the black plastic bag she left the room. According to Timhar, he asked Safia to take the box with her but Safia told him she would come back later to take it. Timhar added that after Safia took out the black bag the box was empty. His wife then used the box to keep her footwear.
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> Timhar further testified that during their entire stay at both hotels, he never approached anybody to negotiate any sale of drugs and neither did anybody approach him to offer to buy dangerous drugs from him.

Timhar relied on his cautioned statement (D1) to support his case. Basically what he said in his cautioned statement is similar to what he said in court except for one major difference. In the cautioned statement he said the box contained jewellery but in court he said it contained a black plastic bag.

[10] The 2nd appellant version:

The 2nd appellant (Nurie) also chose to give evidence under oath. She began by producing her cautioned statement (D2). The material part of her cautioned statement for purposes of her defence was that she never saw the contents of the box nor did she ask Safia what the contents were. Her testimony in court on what happened after the police entered room 808 is as follows. After entering the room the police searched the room and said they were looking for something and kept on searching but found nothing. Then Lance Corporal Karim made a telephone call after which he spoke Suluk, saying "we found it". She said she was shocked and asked Timhar what happened. She then began to cry and told Timhar that they should not have helped Safia keep the box.

She denied that Safia was her invention and that they tried to bribe the police as alleged. She also denied uttering the words "kia ba kan nila na" as claimed by Lance Corporal Karim. She said she would not have allowed Safia to leave the box in the room if she had suspected that it contained drugs. She said she only met Safia twice, once at the airport and the other time at Kinabalu Daya Hotel. However on being reminded by counsel that Timhar in his testimony had said that Safia followed them to Capital Hotel she changed her story somewhat and now said that the last time she saw Safia was when she came to Kinabalu Daya Hotel to take out the black plastic bag.

[11] Three main features arose from the prosecution's case, which dealt with the conduct of the appellants, to prove their guilty minds and their knowledge of the drugs recovered in the box which was in their possession. These were:

(i) The conduct of Timhar in attempting to prevent the police from entering the room which the appellants occupied,

A (ii) The conduct of Nurie upon the recovery of the drugs when she shouted and cried in dismay the Suluk words "they have found the things", and

(iii) The attempt by both appellants in trying to bribe the police.

B **[12]** Learned counsel for the appellants in his submission before us stated that the story as narrated by the police witnesses regarding the appellants' conduct, were nothing more than a recent invention and a fabrication. He based his argument on the fact that the prosecution had not, in their opening speech, adverted to the C incriminating evidence of the offer of the bribe and that Nurie had remarked the words "they have found the thing." Also these facts were not recorded in the police report (P12). The case of *PP v. Sa'ari Jusoh* [2007] 2 CLJ 197 was quoted in support where the Federal Court held, *inter alia*, that:

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> (3) In opening the case the prosecutor can only state all that it is proposed or intended to prove, declarations of the accused or facts, so that the Judge may see if there is any discrepancy between the opening statements and the evidence afterwards adduced.

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[13] As regards the flaw in the prosecution case due to the lack of details in the police report learned counsel relied on the Court of Appeal decision in *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773 where the following finding was made:

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> Now, it is clear from the record provided to us that the first occasion on which the suggestion was made, that the accused was carrying exh. P15 when he emerged from the apartment block in question was during PW5's testimony. This fact found no mention in the police report lodged by PW5 after the accused's arrest, a matter readily admitted by the witness. Neither did this fact find any mention in the opening statement made by the learned deputy public prosecutor in the court below.

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The Police Report by Inspector Willie (P12)

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[14] Let us first deal with P12 ie, the police report which the defence attacked as being lacking in the factual particulars now narrated by the prosecution witnesses. This report was made by Insp. Willie immediately after the arrest of the appellants and the I recovery of the drugs in their hotel room. It consisted of a brief

statement of the items recovered pursuant to the search made in room 808, particulars of the appellants and the seizure of the drugs. This police arrest report is thus merely a brief account of what had transpired in room 808. It is a formal procedure undertaken by the police following the arrest of a suspect to a crime. It is a first information report to facilitate further investigation. It puts the wheels of investigation into a crime in action. It need not, in our view, particularise all the details of actions taken or observations made by the arresting officer. A first information report or any police report need not contain the entire case for the prosecution. Its main purpose is merely to give information of an offence. The information contained in the police report, thus may only state the brief details of the time, and place of the alleged offence and the particulars of the offenders if available. Further details will surely be recorded later by the investigating officer in any statements recorded from potential witnesses including that of the arresting officer himself. Thus any omission or shortcomings in that police report cannot in our view be fatal to the prosecution's case or be held to be materially inconsistent with its narration of the facts during the trial.

[15] In *Chinnakarappan v. PP* [1962] 28 MLJ 360, the Court of Appeal held that:

> the omission of the accused's name in the police report made by a witness does not in any way detract from the weight and value which the trial Judge had attached to the testimony of the complainant himself. The law does not in this case (on a charge under s. 326 of the Penal Code) require independent corroboration of the complainant.

Similarly in this case, the omission by Insp. Willie to state in detail what had transpired during the raid on room 808 does not diminish the weight and credibility of the testimony of Insp. Willie's as accepted by the trial judge.

In *Herchun Singh & Ors v. PP* [1969] 1 LNS 52 the Federal Court endorsed a passage from Sohoni's Indian Criminal Procedure Code on the effect of an omission in a first information report which states:

> .. Further, the information required need not contain the circumstances of the commission of the offence, nor the names of the offenders or the witnesses, for the main purpose of investigation is to ascertain these matters ... The first information report is not

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> an encyclopaedia. It is not the beginning and ending of every case. It is only a complaint to set the affairs of law and order in motion. It is only at the investigation stage that all the details can be gathered and filled up.

B **[16]** We thus hold that no exaggerated importance should be placed to the omission by the complainant in his police report of each and every detail of the events surrounding the raid on room 808 and the subsequent arrest of the appellants. We also hold that although P12 did not contain elaborate details of what transpired at the time of arrest in room 808, this is not fatal to the prosecution's C case. There is nothing in Insp. Willie's testimony and his statement in P12 that cannot stand together or be said to be contradictory. We found no discrepancy in P12 as compared to his evidence.

D **[17]** Another matter that arose out of this issue is the fact that Insp. Willie was not cross-examined on the said omissions in his police report. This matter had been correctly addressed by the learned trial judge who said this in his judgment:

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> If the defence had serious objections to the impugned evidence of Inspector Willie the omission should have been brought to his attention while he has still in the witness box. It is against the principle of fair play to attack the evidence of a witness during submissions when the witness no longer has the opportunity to defend his evidence.

F **[18]** It is trite that if the defence had any misgivings on the authenticity or suspicious nature of any narration of the evidence by the prosecution's witness, then that witness should have been cross-examined on that disputed fact so that an explanation can be given to be properly assessed by the trial court. More so here when the G defence is now submitting that the evidence given by the prosecution had been fabricated and not supported by the police report. To merely advert to the omission to details in the police report at the submission stage would amount to springing a surprise on the prosecution. Essential justice requires that the defence should H be put during the cross-examination of any witness that part of the evidence which is disputed. An early exposition of the defence, even at the prosecution's stage has become an essential feature in the adversarial system of criminal trials in the common law jurisdictions.

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[19] This principle was explained in the case of *AEG Carapiet v. AY Derderiam* AIR 1961 Cal. 359, cited with approval here at home, in *PP v. Dato Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215 HC from this passage:

> It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do during cross-examination that he must put to each of his opponents witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share.

It is therefore of no surprise that the learned trial judge rejected this submission of fabrication of evidence when His Lordship made the following conclusion:

> While it is true that the defence has no duty to supplement any infirmity in the prosecution case it is also true in my view that if the defence wishes the court to reject the evidence of a particular witness on the ground that his evidence is a fabrication due to an omission in his previous statement the witness must at least be confronted with such omission while he was still in the witness box.

We agree with that conclusion.

The Prosecution Opening Statement

[20] We now turn to the matter of non disclosure of this part of the prosecution's case in the DPP's opening statement. The defence submission was that there was no mention made on the conduct of Timhar to offer a bribe when confronted by the police party in room 808, in the opening statement by the prosecution. Thus it may be concluded that both PW3's (Insp. Willie) and PW4's (L/Kpl. Karim) evidence on the allegation of a bribe offer was a recent fabrication and an afterthought.

[21] Section 179 of the Criminal Procedure Code states that "an officer conducting the prosecution shall open his case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused."

[22] The purpose of an opening statement is principally to provide an outline or an overview of the case. *Black's Law Dictionary* (7th edn) defines 'opening statement' as:

> At the outset of a trial, an advocate's statement giving the fact-finder a preview of the case and of the evidence to be presented but not containing argument.

In a sense it introduces the case to the court and gives the judge a picture of the events in the case. It is used often in criminal jurisdictions where the trial is conducted by a judge with the assistance of jurors. In a jury trial, the determination of facts is the duty of the jurors who are laypersons. Thus an opening statement would be an important procedural step where the prosecution, for the first time introduces its case and narrate the story to the jury. The opening statement thus asserts more importance in that instance. It is part of the prosecution's weaponry to make a first impression to the jury of its case. It thus gives the prosecution an opportunity to tell its story, to invoke the interest of the jury and educate it in understanding the case.

[23] In simple drug trafficking trials such as the instant case, which in Malaysia is conducted by a single judge, as both a trier of facts and law, the opening statement does not bear the same impact. The trial judge, just like a magistrate hearing summary cases does not need this 'curtain raiser' for the prosecution to lay out a detailed roadmap of its case.

[24] One of the purposes of s. 179 CPC is to satisfy the court that the charge against an accused person is not frivolous and there is some material for proceeding against him. The details of those material's are however not expected to be produced at the opening statement stage. In most cases, the charge itself is invariably a sufficient overview of what the prosecution case is all about and the evidence it needs to adduce to prove the charge. There is no need for the prosecution to tender a copy of the opening statement to be marked by the court, as is the common practice nowadays. The statement itself need not even be in writing. Indeed the practice in other jurisdictions is to give an oral statement.

[25] The opening statement is not an evidence. It is thus not a requirement that this statement shall contain elaborate details. The omission of the mention of any part of the prosecution evidence in its opening statement, to us, is inconsequential and not destructive to the prosecution case. Nor is the prosecution prevented, later, from adducing any evidence not earlier mentioned in its opening statement. Thus the argument that since the incidence of Timhar's offer of a bribe was not revealed in the opening statement, then PW3 and PW4's evidence on that matter should be deemed as a recent invention or a fabrication is erroneous. What PW3 and PW4 stated as regards Timhar's attempt to bribe them are particulars of evidence. In our view these need not be mentioned in the opening statement. They form part of the prosecution detailed evidence which can be revealed at the trial stage.

[26] We are persuaded in our opinion by relying on the Calcutta High Court case of *RW Harcos v. State Pf West Bengal* [1975] Cr LJ 1256 (Cal), which discussed the effect of s. 226 of the Indian Criminal Procedure Code, which corresponds with our s. 179 CPC. The learned judges in that case give the following commentary on s. 226, with which we agree:

> Under Section 226 of the Code the Public Prosecutor in opening his case for the prosecution is required to describe the charge brought against the accused and to state by what evidence he proposes to prove the guilt of the accused. In other words, the Public Prosecutor should give a brief summary of the evidence and the particulars of the witnesses by which he proposes to prove the case against the accused person. It is not necessary for a Public Prosecutor in opening the case for the prosecution to give full details regarding the evidence including the documents by which he intends to prove his case.

[27] In not adverting to certain details of the evidence in its opening statement, we do not think that the trial court here had been misled into guiding its mind to the charge at hand faced by the appellants. Nor had the appellants been put to any disadvantage resulting in unfairness to them at the trial. The defence as we see it was not put off-guard by the omission to mention this part of the evidence in the opening statement. The prosecution witnesses were put to extensive cross-examination on the matter.

[28] *PP v. Saari Jusoh (supra)*, a recent Federal Court case decided on the approach taken by the apex court to the opening statement under s. 179 CPC. In that case the prosecution opening statement had not mentioned that the accused was in possession of the drugs, merely that there was an arrangement made between the accused and PW7 for the sale of the drugs. The evidence adduced however showed that the accused was in actual possession of the drugs. In that case, there arose the question of adducing evidence that would form a different basis for a conviction from what was stated in the opening statement. In answering the question of whether the prosecution was bound by what was earlier stated in the opening statement, the Federal Court referred to this passage from *R v. Solomon* [1980] 1 A CRIM R 247:

> The fairness or unfairness of travelling beyond the ground covered by the Crown will, of course, be evaluated by the trial judge and will be to the forefront in his deciding how far, if at all, to put new considerations to the jury ...
>
> ... Objections to evidence, lines of cross-examination and decisions upon the material to be advanced on behalf of the accused, not to mention the general trend of the final address to the jury made on behalf of the accused, will all, of course, have been governed by the nature of the Crown case as opened by the prosecutor and developed through evidence tendered on behalf of the Crown at the trial. It is readily understandable that within these procedural and tactical fields there could arise an element of real prejudice if the judge, in his summing-up raises new approaches available to, but not expressly relied upon, by the Crown. But in every case in which a question arises regarding the development of new approaches, the question concerning the judge at first instance, and on appeal the question concerning this Court, will be to determine whether in so doing there will be worked an unfairness to the accused.

[29] Even where a verdict was founded on a different basis from what was stated in the opening statement is not wrong, if there had not occurred a "tactical disadvantage" to the appellants. The Federal Court held so in these words:

> It follows that a verdict can be founded on a basis not indicated by the prosecution in its opening address. But it must be done in such a way so as not to place the accused at a tactical disadvantage with resultant unfairness to him. This conclusion is consistent with s. 422 of the Criminal Procedure Code ("the Code") which reads as follows:

Subject to the provisions contained in this chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:

(a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code; or

(b) the want of any sanction; or

(c) the improper admission or rejection of any evidence,

unless such error, omission, irregularity, want, or improper admission of rejection of evidence has occasioned a failure of justice.

[30] The finding on the attempt by Timhar to bribe the police was a finding of facts by the learned trial judge. Besides appraising the evidence of PW3 and PW4 the learned judge also took into consideration evidence of the defence witness, a police constable, Kons. Muhamed Janid (DW4) who corroborated PW3's evidence on this point. The learned judges found that:

With regard to Inspector Willie's evidence that the accused tried to bribe them Constable Muhamed testified that Inspector Willie did tell him about it. I have no reason to disbelieve him on these points. In any event even without his testimony the prosecution's evidence is sufficient to establish the matters that he testified on.

The trial judge also found that DW4's evidence to be consistent with that of PW3 and PW4, even though the defence treated DW4 as a hostile witness and allowed the defence to cross-examine its own witness. On this aspect the learned judge made a ruling by stating that:

I do not find him (DW4) to be a wholly dishonest witness unworthy of any credit. I find no sufficient reason to reject the whole of his evidence even though he was hostile to the defence. The court can still rely on parts of his evidence if the Court is satisfied that they are the truth.

[31] We find that the learned trial judge's treatment of DW4's evidence as correct in law. It is evident from that passage of the judgment, the learned trial judge had not impeached the credit of DW4. His evidence will thus be assessed and weighed like that of

any other witness, although there may be doubts on the accuracy of his memory (see *Muthusamy v. PP* [1947] 1 LNS 71 HC). At the end of the defence case, it is thus left entirely to the trial court to make a finding on the veracity of that witness and whether to wholly reject or accept in part the testimony of that witness having seen and heard him. (see *PP v. Tan Chye Joo & Anor* [1988] 1 LNS 174 HC).

[32] Thus, on this issue of fabrication or a recent invention of the prosecution's evidence in respect of the conduct of the appellants, we are of the opinion that the conclusion by the learned trial judge was based entirely on the evidence as he found them. It is trite that at the appellate stage, findings of facts by the trial court are rarely disturbed. In this case, the learned trial judge had accepted the evidence adduced by PW3 and PW4 and accepted them as credible, as can be seen from this part of the judgment:

> In the present case on the totality of the evidence before the court, I am not prepared to say that Inspector Willie and Lance Corporal Karim had told lies on the two matters raised by learned counsel. The attempted bribe it will be noted was made to Inspector Willie through the interpretation of Lance Corporal Karim but Lance Corporal Karim's evidence on this point was not challenged at all in cross examination.

[33] Against the prosecution's version of what happened at the time of the police raid, the defence's version was, in our view, merely a denial. There was no cross-examination on the prosecution witnesses that they had fabricated their evidence. As earlier stated in this judgment, this fatal omission is of no help to the defence cause. There was no suggestion put that the prosecution witnesses acted out of malice or vengeance. The defence version thus stood unsubstantiated, and the prosecution version uncontradicted. In such a situation, we feel that it is not wrong for the trial court to have accepted the version adduced by the prosecution. The following advice of Thompson CJ in this oft-quoted passage from *PP v. Mohamed Ali* [1962] 1 LNS 129 is useful in a situation such as this:

> ... When a Police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If he says he saw a cow jumping over the moon his evidence is, of course, not to be accepted, but if he says he saw a cow wandering along one of the main streets of Kuala Lumpur (the sort of thing

> we all see every day of our lives) there is not the slightest justification for refusing to believe him. Of course if his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the Magistrate to decide whether or not it should be accepted. *In the absence of contradiction, however, and in the absence of any element of inherent improbability the evidence of any witness, whether a Police witness or not, who gives evidence on affirmation, should normally be accepted.* (emphasis added).

[34] We would therefore hold, with respect, that the submission of learned counsel of the appellants on this point to be unfounded.

The Cautioned Statements, Whether Plausible

[35] The other contention raised by learned counsel of the appellants was that the learned trial judge had misdirected himself in failing to consider the cautioned statements of both appellants which were adduced in evidence of the defence.

[36] The defence case was that the box from which the drugs were found belonged to a stranger, Safia. It was argued that Safia is not fictitious and that she had been mentioned in the cautioned statements of both Timhar (exh. D1) and Nurie (exh. D2). Both cautioned statements were recorded nine days after the arrest of the appellants. The existence of Safia was of course a relevant issue since, if believed, the trial court could have accepted the explanation of the appellants as having raised a reasonable doubt on the prosecution case.

[37] It was argued by learned counsel that since the appellants were kept apart during their custody prior to the recording of their respective cautioned statements, then their consistent account of their meeting with Safia must be the truth. As such the defence was not a recent fabrication and is supported by both exhs. D1 and D2. Also, it was contended, the police had failed to investigate the truth or otherwise of what were said in the cautioned statements, giving rise to the operation of s. 114(g) Evidence Act 1950, against the prosecution.

[38] Let us quickly say that, having perused the evidence, we find no merit on the contention that an adverse inference could be inferred against the prosecution.

[39] In the earlier trial, when the appellants were called to enter into their defence under s. 39A(2) DDA 1952, in respect of the same drugs, the appellants had admitted that on all the occasions they were together, they had discussed the case. So it was wrong for their learned counsel to argue that since the appellants had been kept apart, they had no opportunity to make up the story about Safia in their respective cautioned statements.

[40] We thus find no fault in the learned trial judge's decision in rejecting the story on Safia as purported by the appellants in their cautioned statements. The opportunities they had to discuss the case support the inference that they had cooked up the story about the imaginary Safia.

[41] The entire defence of the appellants was that they had no knowledge of the drugs in the box left in their custody by Safia. The learned trial judge had, in our opinion, correctly approached the defence by asking the pertinent question of "whether or not they had knowledge must be judged from their outward acts or omission". We find that the learned judge had painstakingly analysed the evidence and applying the principle laid down in *PP v. Badrulsham Baharom* [1987] 1 LNS 72 HC, to rebut the presumption of possession, His Lordship had, in our view, made the correct finding on the defence when he said this:

> Having considered their defence carefully and testing them against the prosecution's evidence and the probabilities of the case I find that their explanations have failed to cast any reasonable doubt in my mind as to their knowledge about the drugs. On the contrary their explanations have strengthened the prosecution's case. Their defence is based on an incredible story. I find no logic in the 1st accused's claim that he had agreed to keep a box for a complete stranger without even asking what the contents were simply because the stranger appeared nice to him.

[42] The learned trial judge had also made an observation on the demeanour of Timhar and had found his answers under cross-examination to be "measured and calculative", and that he was certainly not a "person with a low I.Q" to fall into the trap or inducement of a complete stranger. We cannot disagree with the trial judge on this finding. Only the trial judge can appraise the performance of a witness, which, we say, was properly done in this case.

[43] As for Nurie, the learned trial judge also made the following observation on her demeanour in the witness box:

> I have seen her giving evidence and I must place on record that I do not find her to be an impressive witness at all. From my observation she appeared to be trying too hard to remember what she had to say in court and was careful not to give "wrong" answers which may implicate her and the 1st accused. There were many occasions during cross-examination when she appeared to be looking around for answers and hoping that someone in court would provide her with the answers.

Again, we see no reason to disturb this factual finding of the trial judge. It is the duty of the trial court to decide whether a witness has told a believable story or one that is implausible. It is trite that an appellate court will not interfere with a finding of specific fact based on the credibility of a witness (see *Lai Kim Hon v. PP* [1981] 1 MLJ 84) unless at this appellate stage we can find substantial and compelling reasons for disagreeing with that finding (see *Herchun Singh & Ors v. PP*, *supra*).

[44] There was also no suggestion that Safia, if at all she existed, wanted to frame up the appellants by leaving such a large amount of drugs with them.

[45] As regards the existence of Safia, the learned trial judge being placed in the best position to assess the truthfulness of the appellants' version came to the following conclusion, with which we fully concur:

> I have considered the evidence and the probabilities concerning Safia and I am convinced that she is not a real person. It is hard to believe that a stranger en route to Sandakan from the Philippines would ask another stranger to take care of a box while she was away. No reason was given as to why it was necessary to leave the box with the accused while she was away in Sandakan. This should have aroused the accused's suspicion but surprisingly it did not. Upon her return to Kota Kinabalu from Sandakan two days later Safia took out the contents of the box which according to the accused was a black plastic bag, after which she left the hotel and the empty box. Again she told the accused that she would be back for the empty box. Again the accused agreed to look after the box. One has to be a genius three times over to understand the logic behind this whole exercise.

A The accused came to Kota Kinabalu as tourists, or so they claimed. Yet instead of doing what tourists normally do they were more interested in looking after an empty box. There is nothing probable in this story by any stretch of the imagination. The story about Safia is nothing but a figment of their imaginations.

B The existence of Safia becomes more of an illusion if one were to compare the 1st accused's explanation in court with the explanation he gave to the police in his cautioned statement. In the cautioned statement he said that when Safia opened the box at Kinabalu Daya Hotel he saw only jewelleries inside the box. C His evidence in court is different. He said he saw a black plastic bag inside the box.

There is a world of difference between jewelleries and a black plastic bag. To my mind the discrepancy is not due to memory lapse or genuine mistake. Rather the discrepancy is because he had D invented a new story since giving the cautioned statement.

[46] We therefore conclude that, from the evidence, the learned trial judge had not been wrong in finding that both appellants were in *mens rea* possession of the drugs and that the prosecution had E proven its case beyond a reasonable doubt, and that the defence had failed to raise any reasonable doubt.

[47] For these reasons, this appeal was dismissed and the conviction and sentence affirmed.

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